Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JOHN DOVEY, Director of California Department of Corrections,
Petitioner,

v.

RAYMOND RAMIREZ, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal court of appeals have the authority to issue a certificate of appealability under 28 U.S.C. § 2253, and then vacate the denial of habeas relief, based on a claim that the habeas petitioner had not raised in his prior state or federal court proceedings and did not raise in his request for a certificate of appealability?

2. Does it violate the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas petitioner to develop facts underlying his prior convictions as part of an Eighth Amendment challenge when he never attempted to develop those facts as part of such a challenge in the State court?

3. In light of *Lockyer v. Andrade*, 538 U.S. 63 (2003), can federal habeas corpus relief be granted on the basis of an Eighth Amendment violation when the habeas petitioner's sentence comports with California's Three Strikes Law?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JOHN DOVEY, Director of California Department of Corrections,
Petitioner,

v.

RAYMOND RAMIREZ, *Respondent.*

Petitioner John Dovey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the Ninth Circuit (Apps. A & B) are unreported. The Ninth Circuit's Order granting a Certificate of Appealability is App. D. The District Court's Order denying a certificate of appealability is App. F. The judgment and order of the district court denying habeas relief (Apps. G & H) are unreported. The magistrate judge's report and recommendation (App. I) is unreported. The California Court of Appeal's opinion (App. J) is unreported.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was filed on May 13, 2005. A petition for rehearing en banc was denied on September 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2253 (c) provides in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254 provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–

(A) the claim relies on–

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A California jury convicted Raymond Ramirez of possession of methamphetamine and of being under the influence of methamphetamine. The trial court sentenced Ramirez to state prison for 25 years to life under California's Three Strikes Law because he had two prior qualifying felony convictions. App. I at 37-39; App. J at 45-46.